



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

### **29 CFR Part 4231**

### **RIN 1212-AB31**

### **Mergers and Transfers Between Multiemployer Plans**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

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**SUMMARY:** This proposed rule would amend PBGC's regulation on Mergers and Transfers Between Multiemployer Plans to implement section 121 of the Multiemployer Pension Reform Act of 2014. The proposed rule would also reorganize and update the existing regulation.

**DATES:** Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments, identified by Regulation Identifier Number (RIN) 1212-AB31, may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the Web site

instructions for submitting comments.

- E-mail: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- Fax: 202-326-4112.
- Mail or Hand Delivery: Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212-AB31). Comments received, including personal information provided, will be posted to [www.pbgc.gov](http://www.pbgc.gov). Copies of comments may also be obtained by writing to Disclosure Division,

Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

**FOR FURTHER INFORMATION CONTACT:** Joseph J. Shelton

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**SUPPLEMENTARY INFORMATION:**

**Executive Summary—Purpose of the Regulatory Action**

This rulemaking is needed to implement statutory changes under the Multiemployer Pension Reform Act of 2014 (MPRA) affecting mergers of multiemployer plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The proposed rule also would reorganize and update the existing regulatory requirements applicable to mergers and transfers between multiemployer plans.

PBGC's legal authority for this action is based on section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4231 of ERISA, which sets forth the statutory requirements for mergers and transfers between multiemployer plans.

**Executive Summary—Major Provisions of the Regulatory Action**

Section 121 of MPRA amends the existing rules under section 4231 of ERISA by adding a new section 4231(e), which clarifies PBGC's authority to facilitate the merger of two or more

multiemployer plans if certain statutory requirements are met. For purposes of section 4231(e), “facilitation” may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies. In addition, subject to the requirements of section 4231(e)(2), PBGC may provide financial assistance (within the meaning of section 4261 of ERISA) to facilitate a merger it determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency.

The proposed rule would provide guidance on the process for requesting a facilitated merger under section 4231(e) of ERISA, including a request for financial assistance under section 4231(e)(2). The proposed rule would also reorganize and update the existing regulation.

## **Background**

### *PBGC and the multiemployer insurance program*

PBGC is a Federal corporation created under title IV of ERISA to guarantee the payment of pension benefits earned by more than 40 million American workers and retirees in over 23,000 private-sector defined benefit pension plans.

PBGC administers two insurance programs—one for single-employer defined benefit pension plans, and a second for multiemployer defined benefit pension plans. This proposed rule would apply only to the multiemployer program.

### *Multiemployer Mergers and Transfers under ERISA*

Under section 4231(b) of ERISA, mergers of two or more multiemployer plans and transfers of assets and liabilities between multiemployer plans must comply with four requirements:

- (1) The plan sponsor must notify PBGC at least 120 days before the effective date of the merger or transfer;

(2) No participant's or beneficiary's accrued benefit may be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

(3) The benefits of participants and beneficiaries must not be reasonably expected to be subject to suspension as a result of plan insolvency under section 4245 of ERISA; and

(4) An actuarial valuation of the assets and liabilities of each of the affected plans must have been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or as prescribed by PBGC's regulation.

Section 4231(a) of ERISA grants PBGC authority to vary these requirements by regulation. Part 4231 of PBGC's regulations implements and interprets these requirements by providing a procedure under which plan sponsors must notify PBGC of any merger or transfer between multiemployer plans.

#### *MPRA*

In December 2014, Congress enacted, and the President signed, the Consolidated and Further Continuing Appropriations Act, 2015,<sup>1</sup> of which MPRA is a part. MPRA contains a number of statutory reforms to assist financially troubled multiemployer plans, and to improve the financial condition of PBGC's multiemployer insurance program.

Section 201 of MPRA amended the rules under section 305 of ERISA to add a new "critical and declining" status for financially troubled multiemployer plans (described below in the discussion of "multiemployer facilitated mergers under MPRA"). Generally, a plan is in critical and declining status if it is in critical status under any subparagraph of section 305(b)(2), and is projected to become insolvent within 15-20 years. Plans in critical and declining status

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<sup>1</sup> Division O of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113-235 (128 Stat. 2130 (2014)).

may suspend benefits under section 305(e)(9) of ERISA under certain conditions. The Department of the Treasury (Treasury) has interpretative jurisdiction over the subject matter in section 305.

Sections 121 and 122 of MPRA provide PBGC with new statutory authority to assist critical and declining status plans under certain conditions. Section 121 of MPRA, which is the subject of this rulemaking, authorizes PBGC to facilitate multiemployer plan mergers, including with financial assistance (within the meaning of section 4261) if certain statutory conditions—such as the condition that one or more of the plans involved be in critical and declining status—are met. Section 122 of MPRA amended section 4233 of ERISA to create a new statutory framework for partitions of critical and declining status plans.<sup>2</sup>

Finally, section 131 of MPRA increased the annual premium that multiemployer plans pay to PBGC for 2015 from \$13 to \$26 per participant. For plan years beginning after 2015, the annual premium increases based on increases in the national average wage index. The annual premium for 2016 is \$27 per participant.

#### *Multiemployer facilitated mergers – before MPRA*

PBGC provides financial assistance under section 4261 of ERISA to multiemployer plans that are or will be insolvent under section 4245 of ERISA. Generally, a plan is insolvent when it is unable to pay benefits when due during the plan year. PBGC provides financial assistance to an insolvent plan in the form of a loan sufficient to pay its participants' and beneficiaries' guaranteed benefits.

In a few cases before the enactment of MPRA, PBGC provided financial assistance (within the meaning of section 4261 of ERISA) to facilitate the merger of a soon-to-be insolvent

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<sup>2</sup> PBGC issued an interim final rule under section 4233 of ERISA on June 19, 2015 (80 FR 35220), and a final rule on December 23, 2015 (80 FR 79687).

multiemployer plan into a larger, more financially secure multiemployer plan. The financial assistance provided was a single payment that covered the cost of guaranteed benefits under the failing plan. In exchange, the larger, more financially secure plan assumed responsibility for paying the full plan benefits of the participants and beneficiaries in the failing plan with which it merged. As a result, the participants and beneficiaries in the failing plan received more than they would have in the absence of a facilitated merger from a financially secure plan that was more likely to remain ongoing. In addition, the financial assistance provided was generally less than PBGC's valuation of the present value of future financial assistance to the failing plan.

For a number of reasons, including the deteriorating financial condition of PBGC's multiemployer insurance program, PBGC was only able to facilitate a few financial assistance mergers before MPRA.

#### *Multiemployer facilitated mergers under MPRA*

Section 4231(e)(1) of ERISA provides that upon request by the plan sponsors, PBGC may take such actions as it deems appropriate to promote and facilitate the merger of two or more multiemployer plans. Facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies. The decision to facilitate a merger is within PBGC's discretion. Furthermore, before PBGC may exercise this discretion, it must first determine—in consultation with the Participant and Plan Sponsor Advocate<sup>3</sup>—that the merger is in the interests of the participants and beneficiaries of at least one of the plans, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.

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<sup>3</sup> The Participant and Plan Sponsor Advocate position was created in 2012 by the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law No. 112-141 (126 Stat. 405 (2012)). See section 4004 of ERISA for the rules governing this position. PBGC is not defining the Participant and Plan Sponsor Advocate's consultative role in determining how the merger affects the interests of the participants and beneficiaries of the plans involved, but will let that role evolve based on experience implementing this proposed rule.

Under section 4231(e)(2), PBGC may also provide financial assistance (within the meaning of section 4261) to facilitate a merger that it determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency, if the following statutory conditions are satisfied:

*Critical and declining status.* In accordance with section 4231(e)(2)(A) of ERISA, one or more of the plans involved in the merger must be in critical and declining status as defined in section 305(b)(6). A plan is in critical and declining status if the plan is in critical status under any subparagraph of section 305(b)(2), and is projected to become insolvent within the meaning of section 4245 during the current plan year or any of the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds two to one, or if the funded percentage of the plan is less than 80 percent). Section 305(b)(3)(A)(i) requires an annual certification from the plan actuary on whether a plan is or will be in critical and declining status for the plan year. Treasury has interpretative jurisdiction over the subject matter in section 305.

*Long-term loss and plan solvency.* In accordance with section 4231(e)(2)(B), PBGC must reasonably expect that—

- Financial assistance will reduce PBGC's expected long-term loss with respect to the plans involved; and
- Financial assistance is necessary for the merged plan to become or remain solvent.

*Certification.* In accordance with section 4231(e)(2)(C), PBGC must certify that its ability to meet existing financial assistance obligations to other plans will not be impaired by the financial assistance.

*Source of funding.* In accordance with section 4231(e)(2)(D), financial assistance must be paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans.

*PBGC notice of financial assistance*

Section 4231(e)(2) requires that, not later than 14 days after the provision of financial assistance, PBGC provide notice of the financial assistance to the Committee on Education and the Workforce of the House of Representatives; the Committee on Ways and Means of the House of Representatives; the Committee on Finance of the Senate; and the Committee on Health, Education, Labor, and Pensions of the Senate.

**PBGC Request for Information**

On February 18, 2015, PBGC published in the Federal Register (80 FR 8712) a request for information (RFI) to solicit information from interested parties on issues PBGC should consider in implementing sections 4231 and 4233 of ERISA. PBGC received 20 comments in response to the RFI.<sup>4</sup> This proposed rule reflects public input on facilitated mergers stemming from the comments.

In general, commenters expressed strong support for MPRA's changes to the merger rules under section 4231 of ERISA, and urged PBGC to issue timely guidance to the public on the types of information, documents, data, and actuarial projections needed for a request to be complete. Many of these same commenters urged that whenever possible and consistent with statutory requirements, any new regulatory information requirements should be based on information that plans are already required to prepare, or information that plans could easily develop.

A number of commenters also suggested that PBGC provide guidance on the factors and criteria it will use to evaluate proposed facilitated mergers, while another suggested that

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<sup>4</sup> The RFI and comments are accessible at <http://www.pbtc.gov/prac/pg/other/guidance/multiemployer-notices.html>.



proposed facilitated mergers should be analyzed individually on a case-by-case basis. In addition, one commenter suggested that PBGC provide guidance on any general limitations it may establish on the amount of financial assistance available for facilitated mergers.

PBGC considered these and other comments and decided it will determine whether to provide further guidance on the evaluation criteria for facilitated mergers, and any limitations PBGC may impose relating to the amount of financial assistance available, based on the experience it gains implementing this proposed rule. While the proposed rule does not impose any additional limitations on the amount of financial assistance available for financial assistance mergers, sections 4231(e)(2) and 4233 of ERISA require PBGC to certify that its ability to meet existing financial obligations to other plans will *not* be impaired by the transaction. Furthermore, because the funds available for financial assistance to insolvent plans under 4261, financial assistance mergers under 4231(e)(2), and partitions under section 4233, are derived from the same source—the revolving fund for basic benefits guaranteed under section 4022A (the multiemployer revolving fund)—it is anticipated that the amount of financial assistance available to a critical and declining status plan for a financial assistance merger generally will not exceed the amount available to that plan for a partition (and could be less). Given complexities and uncertainties such as these, the proposed rule includes a provision that would allow a plan sponsor to engage in informal discussions with PBGC before filing a formal request for a facilitated merger.

With respect to the eligibility requirements for a facilitated merger, a few commenters noted that unlike the statutory conditions for a partition under section 4233 of ERISA, which require, among other things, a finding that the plan sponsor has taken all reasonable measures to avoid insolvency, including maximum benefit suspensions, there is no explicit requirement in

section 4231(e) to suspend benefits. Given the absence of such a requirement, these commenters urged PBGC *not* to impose one by regulation. Expressing a similar view, another commenter suggested that PBGC guidance under section 4231(e) should *not* result in the automatic imposition of the same requirements, such as benefit suspensions or a certain type of projection, because although each requirement might be appropriate in some cases, it might not be appropriate in all cases.

PBGC agrees with the commenters and consistent with the express terms of the statute, this proposed rule would neither require nor preclude a plan sponsor's application for both benefit suspensions under section 305(e)(9)(G) and a facilitated merger under section 4231(e). PBGC recognizes, however, that although benefit suspensions are *not* required under section 4231(e), some plans may need both benefit suspensions and a financial assistance merger to become or remain solvent. For example, the plan sponsors of two critical and declining status plans that propose a financial assistance merger may need to consider benefit suspensions if the amount of financial assistance available from PBGC is less than the amount necessary for the merged plan to become or remain solvent.

Before considering an integrated transaction involving benefit suspensions and a facilitated merger, however, plan sponsors must carefully consider how the various requirements under sections 305(e)(9) and 4231 would apply to such a transaction. For example, a critical and declining status plan could merge into a large, well-funded multiemployer plan. In such a case, to the extent any of the benefits previously provided by the critical and declining status plan had been subject to suspension under section 305(e)(9) or become subject to suspension at the same time that the merger occurs, the plan sponsor of the merged plan would become responsible for making the annual determinations necessary for continued benefit suspensions under section

305(e)(9) and the regulations thereunder. Under section 305(e)(9)(C)(ii) of ERISA and the regulations thereunder, benefits may continue to be suspended for a plan year only if the plan sponsor determines, in a written record to be maintained throughout the period of the benefit suspension, that although all reasonable measures to avoid insolvency have been and continue to be taken, the plan is still projected to become insolvent unless benefits are suspended. Absent these determinations, restoration of the suspended benefits would be required.

Finally, one commenter expressed concern that a narrow interpretation of section 4231(e)(2)(B)(ii) would effectively preclude a small, critical and declining status plan from receiving financial assistance to merge into a large, financially healthy multiemployer plan. That section provides, in relevant part, that PBGC must reasonably expect that financial assistance is necessary for the *merged* plan to become or remain solvent.

As explained more fully below in the section-by-section discussion, PBGC does *not* interpret section 4231(e)(2)(B)(ii) to preclude a small, critical and declining status plan from receiving financial assistance to merge into a large, financially healthy multiemployer plan because such an interpretation would be inconsistent with the statute as a whole. Section 4231(e)(2), for example, authorizes PBGC to provide financial assistance to facilitate a merger it determines is necessary to enable *one or more* (but not necessarily all) of the plans involved to avoid or postpone insolvency.

Similarly, section 4231(e)(2)(A) requires only that *one or more* (but not necessarily all) of the plans involved in the merger be in critical and declining status. Given that MPRA neither imposes a requirement that *all* multiemployer plans involved in a financial assistance merger be in critical and declining status, nor requires a finding that the merger is necessary to enable *all* of the plans involved to avoid or postpone insolvency, PBGC does *not* interpret section

4231(e)(2)(B)(ii) to impose any additional eligibility conditions beyond those expressly provided in the statute.

A more detailed discussion of the proposed rule and the RFI comments follows.

## **Proposed Regulatory changes**

### *Overview*

The proposed rule would amend part 4231 of PBGC's regulations to implement MPRA's changes to section 4231 of ERISA. The proposed rule also would reorganize and update the existing regulation to reflect other changes in law.

Under the proposed rule, part 4231 would provide guidance on: (1) the process for submitting a notice of merger or transfer, and a request for a compliance determination or facilitated merger; (2) the information required in such notices and requests; (3) the notification process for PBGC decisions on requests for facilitated mergers; and (4) the scope of PBGC's jurisdiction over a merged plan that received financial assistance. The proposed rule also would reorganize part 4231 by dividing it into subparts. Subpart A would contain the general merger and transfer rules. Subpart B would provide guidance on procedures and information requirements for facilitated mergers, including those involving financial assistance.

In most instances, implementation of the mergers and transfers addressed in this proposed rule, including facilitated mergers, will involve conduct that is also subject to the fiduciary responsibility standards of part 4 of subtitle B of title I of ERISA. Among other things, these standards require that a fiduciary with respect to a plan act prudently, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. The fact that a merger or transfer, including a facilitated merger, may satisfy title IV of ERISA and the

regulations thereunder is not determinative of whether it satisfies the requirements of part 4 of subtitle B of title I of ERISA (other than section 406(a) and (b)(2), in the event of a compliance determination).

Finally, the proposed rule would be applicable to mergers and transfers for which a notice, and, if applicable, request for a facilitated merger are filed with PBGC on or after the effective date of the final rule. If a plan sponsor chooses to submit an application for a facilitated merger before the issuance of a final rule, then the plan sponsor may need to revise or supplement its request to take into account the requirements under the final rule.

### *Section-by-section discussion*

#### *Subpart A—General Provisions*

Section 4231.1 of the proposed rule describes the purpose and scope of part 4231, which is to prescribe notice requirements for mergers and transfers of assets or liabilities among multiemployer plans and to interpret other requirements under section 4231 of ERISA.

Section 4231.2 of the proposed rule would amend the current regulation by adding new definitions, and by moving existing definitions defined elsewhere in the current regulation to § 4231.2. For example, the proposed rule would move the existing definition of “effective date” from § 4231.8(a) to § 4231.2.

Under the proposed rule, the term “facilitated merger” would mean a merger of two or more multiemployer plans facilitated by PBGC under section 4231(e) of ERISA, including a merger that is facilitated with financial assistance under section 4231(e)(2).

The term “financial assistance” would mean financial assistance under section 4261, which may be in the form of one or more payments.

The term “financial assistance merger” would mean a facilitated merger for which PBGC provides financial assistance under section 4231(e)(2).

Consistent with the definition of “merged plan” in § 4211.2, the term “merged plan” would mean a plan that is the result of the merger of two or more multiemployer plans.

The proposed rule also would amend the existing definition of “significantly affected plan” in § 4231.2 to include a plan in endangered or critical status, as defined in section 305(b) of ERISA,<sup>5</sup> that engages in a transfer (other than a de minimis transfer). When the regulation was originally published, only plans transferring 15% or more of their assets, or receiving a transfer of unfunded accrued benefits equaling 15% or more of their assets were treated as significantly affected plans.

In PBGC’s view, endangered and critical status plans generally present a greater risk of insolvency, and when these plans engage in non-de minimis transfers their risk of insolvency may increase. Consistent with this view, the proposed rule would expand the definition of “significantly affected plan” to include endangered and critical status plans engaging in non-de minimis transfers. Although the proposed rule would apply the stricter plan solvency test under § 4231.6(b) to non-de minimis transfers involving endangered and critical status plans, that test would only apply to *transfers* involving such plans (*not* mergers).

#### *Requirements for mergers and transfers*

Section 4231.3 of the proposed rule provides guidance on the requirements for mergers and transfers. As under the current regulation, § 4231.3(a) of the proposed rule sets forth the statutory criteria under section 4231(b) of ERISA. The proposed rule also would amend the current regulation to clearly provide that plan sponsors may engage in informal consultations

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<sup>5</sup> “Endangered” and “critical” status are plan categories established by the Pension Protection Act of 2006, Public Law No. 109-280 (120 Stat. 780 (2006) (PPA)).

with PBGC to discuss proposed mergers and transfers. As noted above in the discussion of the RFI comments, informal consultation is particularly important in the context of a proposed financial assistance merger because PBGC's ability to provide financial assistance will depend on, among other things, its ability to meet existing financial assistance obligations to other plans.

Section 4231.4 of the current regulation is unchanged under the proposed rule. That section provides guidance on the requirement under section 4231(b)(2) of ERISA that no participant's or beneficiary's accrued benefit may be lower immediately after the effective date of a merger or transfer than the benefit immediately before that date.

Section 4231.5 of the current regulation provides guidance on the actuarial valuation requirement under section 4231(b)(4) of ERISA. For a plan that is not a significantly affected plan, it provides that the actuarial valuation requirement under section 4231(b)(4) is satisfied if an actuarial valuation has been performed for the plan based on the plan's assets and liabilities as of a date not more than three years before the date on which the notice of the merger or transfer is filed. When the regulation was originally published, section 302(c)(9) of ERISA required plans to have an actuarial valuation performed every three years, and PBGC adopted that timeframe for non-significantly affected plans.

Because multiemployer plans are now required under section 304(c)(7) of ERISA<sup>6</sup> to perform actuarial valuations not less frequently than once every year, the proposed rule would amend § 4231.5 to require that each plan involved in a merger or transfer have an actuarial valuation performed for the plan year preceding the proposed effective date of the merger or transfer. The proposed rule further provides that if the valuation is not complete as of the date the plan sponsors file the notice of merger or transfer, the plan sponsors may provide the most

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<sup>6</sup> Sections 302 and 304 of ERISA were repealed and replaced by PPA. Section 304 of ERISA, as amended by PPA, sets forth the minimum funding standards for multiemployer plans.

recent actuarial valuation performed for the plans with the notice, and the required valuations when complete.

Section 4231.6 of the current regulation provides guidance on “plan solvency” tests that operate as regulatory safe harbors under section 4231(b)(3) of ERISA. Section 4231(b)(3) prohibits a merger or transfer unless “the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 4245.” Section 4245, in turn, provides that an insolvent plan must suspend benefits that are above the level guaranteed by PBGC to the extent the plan has insufficient assets to pay such benefits.

For a plan that is not a significantly affected plan, § 4231.6(a) of the current regulation provides that the plan solvency requirement under section 4231(b)(3) of ERISA and § 4231.3(a)(3)(i) is satisfied if one of the following tests are met:

(1) The expected fair market value of plan assets immediately after the merger or transfer equals or exceeds five times the benefit payments for the last plan year ending before the proposed effective date of the merger or transfer, or

(2) In each of the first five plan years beginning on or after the proposed effective date of the merger or transfer, expected plan assets plus expected contributions and investment earnings equal or exceed expected expenses and benefit payments for the plan year.

The proposed rule would amend and reorder these tests in the following manner. First, under § 4231.6(a)(1) of the proposed rule, a plan will satisfy the plan solvency requirement if in each of the first ten plan years beginning on or after the proposed effective date of the merger or transfer, the plan’s expected fair market value of assets plus expected contributions and investment earnings equal or exceed expected expenses and benefit payments for the plan year.



Alternatively, under § 4231.6(a)(2) of the proposed rule, a plan will satisfy the plan solvency requirement if the plan's expected fair market value of assets immediately after the merger or transfer equals or exceeds ten times the benefit payments for the last plan year ending before the proposed effective date of the merger or transfer.

Accordingly, in addition to reordering § 4231.6(a)(1) and (2), the proposed rule would change the period of years in § 4231.6(a)(2) of the current regulation from "five plan years" to "ten plan years," and the multiple in § 4231.6(a)(1) from "five times the benefit payments" to "ten times the benefit payments." Based on PBGC's experience under the multiemployer program since the regulation was first published, PBGC believes that the proposed changes will provide a better demonstration that benefits are not reasonably expected to be subject to suspension under section 4245 of ERISA as a result of insolvency. At the same time, PBGC recognizes that the majority of multiemployer plan mergers will broaden the contribution base and stabilize the plans involved. Therefore, as is the case under the current regulation for a plan that cannot satisfy the solvency tests under § 4231.6(a), the proposed rule would continue to allow an enrolled actuary to "otherwise demonstrate" that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA as a result of insolvency.

Section 4231.6(b) of the current regulation sets forth a more rigorous solvency test for significantly affected plans. The proposed rule would amend § 4231.6(b)(2) by changing the requirement that assets cover benefit payments for the first "five" years after the proposed effective date to "ten" years. In addition, the proposed rule would amend § 4231.6(b)(4)(i) by changing the amortization period from 25 to 15 years to reflect the amortization period generally

applicable to changes in funding of multiemployer plans under PPA.<sup>7</sup> Finally, the proposed rule would amend § 4231.6(c)(1) by requiring withdrawal liability payments to be listed separately from contributions.

Section 4231.7 of the current regulation sets forth special rules for de minimis mergers and transfers. That section would remain unchanged under the proposed rule.

Section 4231.8 of the current regulation sets forth requirements for notices of mergers and transfers, and requests for compliance determinations under section 4231(c). In general, a notice of a merger or transfer must be filed not less than 120 days, or not less than 45 days in the case of a merger for which a compliance determination is not requested, before the effective date of a merger or transfer. Section 4231.8(f) permits PBGC to waive the timing of the notice requirements under certain circumstances.

In the case of a facilitated merger, the proposed rule would amend § 4231.8(a) to require that notice of a proposed facilitated merger be filed not less than 270 days before the proposed effective date of a facilitated merger. As noted above in the discussion of § 4231.2, the proposed rule would also move the definition of “effective date” from § 4231.8(a)(1) to § 4231.2. Finally, the proposed rule would move the information requirements contained in § 4231.8(e) to a new § 4231.9.

Section 4231.9 of the proposed rule would generally retain the existing information requirements in § 4231.8(e) with minor modifications. For example, the de minimis exception contained in § 4231.8(e)(6) would not apply to a request for a financial assistance merger.

Section 4231.10 of the proposed rule (§ 4231.9 of the existing regulation) describes the additional information required for a request for a compliance determination. The proposed rule would amend this section to make clear that a request for a compliance determination must be

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<sup>7</sup> See section 304(b) of ERISA.

filed contemporaneously with a notice of merger or transfer. In addition, the proposed rule would delete the “place of filing” provision in § 4231.9(1) as that information is now contained in § 4231.8(e), and would delete certain information requirements as those requirements are now contained in § 4231.9(e).

Section 4231.11 of the proposed rule (§ 4231.10 of the existing regulation) describes the requirements for actuarial calculations and assumptions. The proposed rule would conform the regulation to section 304(c)(3) of ERISA, would specify that calculations must be performed by an enrolled actuary, and would expand the bases upon which PBGC may require updated calculations.

#### *Subpart B—Additional Rules for Facilitated Mergers*

Section 4231.12 of the proposed rule provides general guidance on a request for a facilitated merger. A request for a facilitated merger, including a financial assistance merger, must satisfy the requirements of section 4231(b) of ERISA and subpart A of the regulation, in addition to section 4231(e) of ERISA and subpart B. The procedures set forth in the proposed rule would represent the exclusive means by which PBGC will approve a request for a facilitated merger, including a financial assistance merger. Any financial assistance provided by PBGC will be limited by section 4261 of ERISA and with respect to the guaranteed benefits of the plans involved in the merger that are in critical and declining status. In addition, as noted above, because the funds available for financial assistance mergers under section 4231(e), partitions under section 4233, and financial assistance to insolvent plans under 4261, are derived from the same source—the revolving fund for basic benefits guaranteed under section 4022A (the multiemployer revolving fund)—it is anticipated that the amount of financial assistance available to a critical and declining status plan for a financial assistance merger generally will not exceed

the amount available to that plan for a partition (and could be less). Finally, while PBGC expects that in most cases the financial assistance it provides in a facilitated merger will be in the form of periodic payments, PBGC agrees with the RFI comment advocating flexibility in the structure of financial assistance (*e.g.*, lump sum or periodic payments), and consistent with past practice will decide the structure of financial assistance on a case-by-case basis.

Section 4231.12 of the proposed rule would also provide guidance on the information required for a request for a facilitated merger. It states that a request must include the information required under §§ 4231.9 (notice of merger or transfer) and 4231.10 (request for compliance determination), as well as a detailed narrative description with supporting documentation demonstrating that the proposed merger is in the interests of participants and beneficiaries of at least one of the plans, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The narrative description and supporting documentation should reflect, among other things, any material efficiencies expected as a result of the merger and the basis for those expectations.

In addition, a request for a financial assistance merger must contain the information described in § 4231.13 (plan information), § 4231.14 (financial assistance merger information), § 4231.15 (actuarial and financial information), and § 4231.16 (participant census data). The proposed rule provides that PBGC may require additional information to determine whether the requirements of section 4231(e) of ERISA are met or to enable it to facilitate the merger. Finally, § 4231.12 of the proposed rule would impose an affirmative obligation on the plan sponsors to promptly notify PBGC in writing if the plan sponsor(s) discovers that any material fact or representation contained in or relating to the request for a facilitated merger, or in any supporting documents, is no longer accurate, or has been omitted.

### *Information requirements for financial assistance merger*

Section 4231.13 of the proposed rule would provide guidance on the various categories of plan-related information required for a request for a financial assistance merger, such as trust agreements, formal plan documents, summary plan descriptions, summaries of material modifications, and rehabilitation or funding improvement plans. PBGC expects that most, if not all, of the information required under this section should be readily available and accessible by plan sponsors.

Section 4231.14 of the proposed rule sets forth information requirements relating to the proposed structure of a financial assistance merger. The information required includes a detailed description of the financial assistance merger, including any larger integrated transaction of which the proposed merger is a part (including, but not limited to, an application for suspension of benefits under section 305(e)(9)(G) of ERISA), and the estimated total amount of financial assistance the plan sponsors request for each year. It would also require a narrative description of the events that led to the sponsors' decision to request a financial assistance merger, and the significant risks and assumptions relating to the proposed financial assistance merger and the projections provided.

Section 4231.15 of the proposed rule would identify the actuarial and financial information required for a request for a financial assistance merger. The first two information requirements relate to plan actuarial reports and actuarial certifications, which should ordinarily be within the possession of the plan sponsors or plan actuaries. Sections 4231.15(c)-(f) of the regulation would require the submission of certain actuarial and financial information specific to the proposed financial assistance merger, which are necessary for PBGC to evaluate the solvency requirements under section 4231(e)(2) of ERISA.

Under § 4231.15 of the proposed rule, each critical and declining plan must demonstrate that its projected date of insolvency without the merger is sooner than the projected date of insolvency of the merged plan. The plan(s) may take the proposed financial assistance into account in this demonstration.

Section 4231.15 of the proposed rule would also provide guidance on the required demonstration that financial assistance is necessary for the merged plan to become or remain solvent. Under the proposed rule, the type of projection required will depend on whether the merged plan would be in critical status under section 305(b) of ERISA immediately following the merger (without taking the proposed financial assistance into account), as reasonably determined by the actuary. For example, if a critical and declining status plan merges into an endangered status plan, and the actuary anticipates that the merged plan would not meet minimum funding requirements for the coming year without financial assistance, then the merged plan would be in critical status for purposes of the projections. Alternatively, if the actuary anticipates that the merged plan would not be described in section 305(b)(2)(A)-(D) of ERISA immediately after the merger, then the merged plan would not be in critical status for purposes of the projections (even if the merged plan could elect to be in critical status).

Under the proposed rule, the plan's enrolled actuary may use any reasonable estimation for determining the expected funded status of the merged plan. Under an optional approach, the funded status of the merged plan could be determined based on the combined data and projections underlying the status certifications of each of the plans for the plan year immediately preceding the merger (including any selected updates in the data based on the experience of the plans in the immediately preceding plan year). PBGC requests comments on this issue, including methods to determine whether the merged plan would be in critical status.

Under § 4231.15(f)(1) of the proposed rule, if the merged plan would be in critical status under section 305(b) of ERISA (without taking the proposed financial assistance into account), the plans must demonstrate that financial assistance is necessary for the merged plan to “avoid insolvency” under section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder (excluding stochastic projections). This more rigorous solvency standard is consistent with the “emergence” test under section 305(e)(4)(B) of ERISA, which requires a plan in critical status to show that is not projected to become insolvent for any of the 30 succeeding plan years.

If the merged plan would *not* be in critical status under section 305(b) of ERISA (without taking the proposed financial assistance into account), § 4231.15(f)(2) of the proposed rule provides that the plans must demonstrate that the merged plan is *not* projected to become insolvent during the 20 years beginning after the proposed effective date of the merger with the proposed financial assistance. If such a demonstration can be satisfied without taking the proposed financial assistance into account, or if the amount of financial assistance requested exceeds the amount that satisfies this demonstration, the plan sponsors must demonstrate that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan’s ability to remain solvent.

In summary, under the proposed rule, critical status plans would be subject to a different solvency standard than non-critical status plans. This is consistent with the RFI comments that suggested determining solvency on a case-by-case basis, and maintains flexibility in the solvency demonstration for a merged plan that would *not* be in critical status. To encourage the merger of critical and declining status plans into financially stable plans, the proposed rule provides for a solvency demonstration based on the circumstances and challenges specific to the merged plan (for example, the merger might have an impact on the plan’s funding requirements, increase the

ratio of inactive to active participants, or decrease the funded percentage of the healthy plan in a manner that can be demonstrated to adversely affect the merged plan's ability to remain solvent long-term). PBGC requests comments on this issue, including alternative approaches or methods to demonstrate plan solvency.

Section 4231.16 of the proposed rule would identify the types of participant census data to include with a request for a financial assistance merger.

#### *Decision on request for facilitated merger*

Section 4231.17 of the proposed rule would describe the manner in which PBGC will notify a plan sponsor of PBGC's decision on a request for a facilitated merger. PBGC will approve or deny a request for a facilitated merger in writing and in accordance with the standards set forth in section 4231(e) of ERISA.<sup>8</sup> If PBGC denies a request, PBGC's written decision will state the reason(s) for the denial. If PBGC approves a request for a financial assistance merger, PBGC will provide a financial assistance agreement detailing the total amount and terms of the financial assistance as soon as practicable thereafter. The decision to approve or deny a request for facilitated merger under section 4231(e) of ERISA is within PBGC's discretion, and would be a final agency action not subject to PBGC's rules for reconsideration or administrative appeal.

#### *Jurisdiction over financial assistance merger*

Section 4231.18 of the proposed rule would describe PBGC's jurisdiction over the merged plan resulting from a financial assistance merger. PBGC has determined that maintaining oversight is necessary to ensure compliance with financial assistance agreements, and proper stewardship of PBGC financial assistance. This is also consistent with one of the RFI

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<sup>8</sup> As noted above, section 4231(e)(1) of ERISA requires a determination by PBGC in consultation with the Participant and Plan Sponsor Advocate to approve a facilitated merger. Section 4231(e)(2) of ERISA sets forth four additional statutory conditions that must be satisfied before PBGC may approve a request for a financial assistance merger. PBGC will review each request for a facilitated merger, including a financial assistance merger, on a case-by-case basis in accordance with the statutory criteria in section 4231(e) of ERISA.



comments. Based on the foregoing, § 4231.18(a) would provide that PBGC will continue to have jurisdiction over the merged plan resulting from a financial assistance merger to carry out the purposes, terms, and conditions of the financial assistance merger, sections 4231 and 4261 of ERISA, and the regulations thereunder. Section 4231.18(b) would state that PBGC may, upon notice to the plan sponsor, make changes to the financial assistance agreement(s) in response to changed circumstances consistent with sections 4231 and 4261 of ERISA and the regulations thereunder.

### **Request for Comments**

In addition to the specific requests for comments identified above, PBGC encourages all interested parties to submit their comments, suggestions, and views concerning the provisions of this proposed rule. In particular, PBGC is interested in any area in which additional guidance may be needed.

### **Applicability**

The amendments to part 4231 would be applicable to mergers and transfers for which a notice, and, if applicable, request are filed with PBGC on or after the effective date of the final rule.

### **Compliance with Rulemaking Guidelines**

*Executive Orders 12866 “Regulatory Planning and Review” and 13563 “Improving Regulation and Regulatory Review”*

Having determined that this rulemaking is a “significant regulatory action” under Executive Order 12866, the Office of Management and Budget has reviewed this proposed rule under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches

that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts.

Pursuant to section 1(b)(1) of Executive Order 12866 (as amended by Executive Order 13422), PBGC has determined that regulatory action is required in this area. Principally, this regulatory action is necessary to implement the requirements for a request for a facilitated merger under section 4231 of ERISA, as amended by MPRA.

In accordance with OMB Circular A-4, PBGC also has examined the economic and policy implications of this proposed rule and has concluded that the action's benefits justify its costs. Plan sponsors requesting a facilitated merger should have readily accessible the information needed for a request under this proposed rule. Most of the information requirements pertain to a request for facilitation of a merger with financial assistance. These requirements are largely the same as the information requirements in the interim final rule that PBGC published in the Federal Register on June 19, 2015 (80 FR 35220) about partition of a multiemployer plan. Public comments to that interim final rule stated that its information requirements were not overly burdensome.<sup>9</sup> In addition, if the plan sponsors' request for facilitation of a merger with financial assistance is approved, the merged plan benefits by receiving enough financial assistance to remain solvent. The benefits to participants equal or exceed the costs to PBGC.

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<sup>9</sup> The partition rule and comments are accessible at <http://www.pbgc.gov/prac/pg/other/guidance/final-rules.html>. PBGC published the final rule in the Federal Register on December 23, 2015 (80 FR 79687).

Further, under section 4231(e)(2) of ERISA, PBGC cannot provide financial assistance to facilitate a merger unless its expected long-term loss with respect to the plans is reduced, and PBGC's ability to satisfy existing financial assistance obligations to other plans is not impaired.<sup>10</sup>

Under Section 3(f)(1) of Executive Order 12866, a regulatory action is economically significant if “it is likely to result in a rule that may \* \* \* [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” OMB has determined that this proposed rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant.

Based on a review of the requirements plans and PBGC must comply with for both partitions and financial assistance mergers, particularly the requirement that PBGC not impair its ability to help other troubled plans, PBGC expects that fewer than 20 plans would be approved for either partition or financial assistance merger over the next three years (about six plans per year), and that the total financial assistance PBGC would provide under both provisions would be less than \$60 million per year.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the

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<sup>10</sup> See sections 4231(e)(2)(B)(i) and 4231(e)(2)(C) of ERISA.

time of the publication of the proposed rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to the proposed amendments to the Annual Financial and Actuarial Information Reporting regulation, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations<sup>11</sup> and is consistent with certain requirements in title I of ERISA<sup>12</sup> and the Internal Revenue Code (Code),<sup>13</sup> as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.<sup>14</sup>

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR § 121.201) pursuant to the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments to part 4231.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial

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<sup>11</sup> See, e.g., special rules for small plans under part 4007 (Payment of Premiums).

<sup>12</sup> See, e.g., section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

<sup>13</sup> See, e.g., section 430(g)(2)(B) of the Code, which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

<sup>14</sup> See, e.g., DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

number of small entities. In 2014, multiemployer plans with fewer than 250 participants made up just 11% of the total 1,425 multiemployer plans. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), sections 603 and 604 do not apply.

#### *Paperwork Reduction Act*

PBGC is submitting the information collection requirements under this proposed rule to the Office of Management and Budget under the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The collection of information in part 4231 is approved under control number 1212-0022 (expires July 31, 2017). PBGC estimates that there will be 28 respondents each year and that the total annual burden of the collection of information will be about 63.125 hours and \$169,995. For purposes of estimating the total annual burden numbers for the collection of information in part 4231, PBGC assumed that it will receive a total of six requests for facilitation of a merger with financial assistance, with a per respondent annual burden of 10 hours and \$26,250.

Comments on the information requirements under this proposed rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395-6974. Comments may be submitted through [insert date 60 days after publication in the Federal Register]. Comments may address (among other things) —

- Whether the collection of information is needed for the proper performance of PBGC's functions and will have practical utility;

- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

#### **List of Subjects in 29 CFR Part 4231**

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, PBGC proposes to amend 29 CFR chapter XL by revising part 4231 to read as follows:

## **PART 4231—MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS**

### **Subpart A—General Provisions**

Sec.

- 4231.1 Purpose and scope.
- 4231.2 Definitions.
- 4231.3 Requirements for mergers and transfers.
- 4231.4 Preservation of accrued benefits.
- 4231.5 Valuation requirement.
- 4231.6 Plan solvency tests.
- 4231.7 De minimis mergers and transfers.
- 4231.8 Filing requirements; timing and method of filing.
- 4231.9 Notice of merger or transfer.
- 4231.10 Request for compliance determination.
- 4231.11 Actuarial calculations and assumptions.

### **Subpart B—Additional Rules for Facilitated Mergers**

- 4231.12 Request for facilitated merger.
- 4231.13 Plan information for financial assistance merger.
- 4231.14 Description of financial assistance merger.
- 4231.15 Actuarial and financial information for financial assistance merger.
- 4231.16 Participant census data for financial assistance merger.
- 4231.17 PBGC action on a request for facilitated merger.
- 4231.18 Jurisdiction over financial assistance merger.

**Authority:** 29 U.S.C. 1302(b)(3)

## **PART 4231—MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS**

### **Subpart A—General Provisions**

#### **§ 4231.1 Purpose and scope.**

(a) *General*—(1) *Purpose*. The purpose of this part is to prescribe notice requirements under section 4231 of ERISA for mergers and transfers of assets or liabilities among multiemployer pension plans. This part also interprets the other requirements of section 4231 of ERISA and prescribes special rules for de minimis mergers and transfers.

(2) *Scope*. This part applies to mergers and transfers among multiemployer plans where

all of the plans immediately before and immediately after the transaction are multiemployer plans covered by title IV of ERISA.

(b) *Additional requirements.* Subpart B of this part sets forth the additional requirements for and procedures specific to a request for a facilitated merger.

#### **§ 4231.2 Definitions.**

The following terms are defined in § 4001.2 of this chapter: *annuity*, *Code*, *EIN*, *ERISA*, *fair market value*, *guaranteed benefit*, *IRS*, *multiemployer plan*, *normal retirement age*, *PBGC*, *plan*, *plan sponsor*, *plan year*, and *PN*. In addition, the following terms are defined for purposes of this part:

*Actuarial valuation* means a valuation of assets and liabilities performed by an enrolled actuary using the actuarial assumptions used for purposes of determining the charges and credits to the funding standard account under section 304 of ERISA and section 431 of the Code.

*Advocate* means the Participant and Plan Sponsor Advocate under section 4004 of ERISA.

*Critical and declining status* has the same meaning as the term has under section 305(b)(6) of ERISA and section 432(b)(6) of the Code.

*Critical status* has the same meaning as the term has under section 305(b)(2) of ERISA and section 432(b)(2) of the Code, and includes “critical and declining status” as defined in section 305(b)(6) of ERISA and section 432(b)(6) of the Code.

*De minimis merger* is defined in § 4231.7(b).

*De minimis transfer* is defined in § 4231.7(c).

*Effective date* means, with respect to a merger or transfer, the earlier of—

(1) The date on which one plan assumes liability for benefits accrued under another plan



involved in the transaction; or

(2) The date on which one plan transfers assets to another plan involved in the transaction.

*Endangered status* has the same meaning as the term has under section 305(b)(1) of ERISA and section 432(b)(1) of the Code, and includes “seriously endangered status” as described in section 305(b)(1) of ERISA and section 432(b)(1) of the Code.

*Facilitated merger* means a merger of two or more multiemployer plans facilitated by PBGC under section 4231(e) of ERISA, including a merger that is facilitated with financial assistance under section 4231(e)(2) of ERISA.

*Fair market value of assets* has the same meaning as the term has for minimum funding purposes under section 304 of ERISA and section 431 of the Code.

*Financial assistance* means periodic or lump sum financial assistance payments from PBGC under section 4261 of ERISA.

*Financial assistance merger* means a merger facilitated by PBGC for which PBGC provides financial assistance (within the meaning of section 4261 of ERISA) under section 4231(e)(2) of ERISA.

*Insolvent* has the same meaning as insolvent under section 4245(b) of ERISA.

*Merged plan* means a plan that is the result of the merger of two or more multiemployer plans.

*Merger* means the combining of two or more plans into a single plan. For example, a consolidation of two plans into a new plan is a merger.

*Significantly affected plan* means a plan that—

(1) Transfers assets that equal or exceed 15 percent of its assets before the transfer,

(2) Receives a transfer of unfunded accrued benefits that equal or exceed 15 percent of its assets before the transfer,

(3) Is created by a spinoff from another plan,

(4) Engages in a merger or transfer (other than a de minimis merger or transfer) either—

(i) After such plan has terminated by mass withdrawal under section 4041A(a)(2) of ERISA, or

(ii) With another plan that has so terminated, or

(5) Is in either endangered status or critical status, and engages in a transfer (other than a de minimis transfer).

*Transfer and transfer of assets or liabilities* mean a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans (including a plan that did not exist prior to the transfer). However, the shifting of assets or liabilities pursuant to a written reciprocity agreement between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets or liabilities. In addition, the shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.

*Unfunded accrued benefits* means the excess of the present value of a plan's accrued benefits over the plan's fair market value of assets, determined on the basis of the actuarial valuation required under § 4231.5.

### **§ 4231.3 Requirements for mergers and transfers.**

(a) *General requirements.* A plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans or transfer assets or liabilities to or from another

multiemployer plan unless the merger or transfer satisfies all of the following requirements:

(1) No participant's or beneficiary's accrued benefit is lower immediately after the effective date of the merger or transfer than the benefit immediately before that date.

(2) Actuarial valuations of the plans that existed before the merger or transfer have been performed in accordance with § 4231.5.

(3) For each plan that exists after the transaction, an enrolled actuary—

(i) Determines that the plan meets the applicable plan solvency requirement set forth in § 4231.6; or

(ii) Otherwise demonstrates that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA.

(4) The plan sponsor notifies PBGC of the merger or transfer in accordance with §§ 4231.8 and 4231.9.

(b) *Compliance determination.* If a plan sponsor requests a determination that a merger or transfer that may otherwise be prohibited by section 406(a) or (b)(2) of ERISA satisfies the requirements of section 4231 of ERISA, the plan sponsor must submit the information described in § 4231.10 in addition to the information required by § 4231.9. PBGC may request additional information if necessary to determine whether a merger or transfer complies with the requirements of section 4231 and subpart A of this part. Plan sponsors are not required to request a compliance determination. Under section 4231(c) of ERISA, if PBGC determines that the merger or transfer complies with section 4231 of ERISA and subpart A of this part, the merger or transfer will not constitute a violation of the prohibited transaction provisions of section 406(a) and (b)(2) of ERISA.

(c) *Certified change in bargaining representative.* Transfers of assets and liabilities

pursuant to a change of collective bargaining representative certified under the Labor-Management Relations Act of 1947 or the Railway Labor Act, as amended, are governed by section 4235 of ERISA. Plan sponsors involved in such transfers are not required to comply with subpart A of this part. However, under section 4235(f)(1) of ERISA, the plan sponsors of the plans involved in the transfer may agree to a transfer that complies with sections 4231 and 4234 of ERISA. Plan sponsors that elect to comply with sections 4231 and 4234 of ERISA must comply with the rules in subpart A of this part.

(d) *Informal consultation.* Nothing in this part precludes a plan sponsor from contacting PBGC on an informal basis to discuss a potential merger or transfer.

#### **§ 4231.4 Preservation of accrued benefits.**

Section 4231(b)(2) of ERISA and § 4231.3(a)(1) require that no participant's or beneficiary's accrued benefit may be lower immediately after the effective date of the merger or transfer than the benefit immediately before the merger or transfer. A plan that assumes an obligation to pay benefits for a group of participants satisfies this requirement only if the plan contains a provision preserving all accrued benefits. The determination of what is an accrued benefit must be made in accordance with section 411 of the Code and the regulations thereunder.

#### **§ 4231.5 Valuation requirement.**

The actuarial valuation requirement under section 4231(b)(4) of ERISA and § 4231.3(a)(2) is satisfied if an actuarial valuation has been performed for the plan based on the plan's assets and liabilities as of a date not earlier than the first day of the last plan year ending before the proposed effective date of the transaction. If the actuarial valuation required under this section is not complete when the notice of merger or transfer is filed, the plan sponsor may provide the most recent actuarial valuation for the plan with the notice, and the actuarial

valuation required under this section when complete. For a significantly affected plan involved in a transfer, other than a plan that is a significantly affected plan only because the transfer involves a plan that has terminated by mass withdrawal under section 4041A(a)(2) of ERISA, the valuation must separately identify assets, contributions, and liabilities being transferred and must be based on the actuarial assumptions and methods that are expected to be used for the plan for the first plan year beginning after the transfer.

**§ 4231.6 Plan solvency tests.**

(a) *General.* For a plan that is not a significantly affected plan, the plan solvency requirement of section 4231(b)(3) of ERISA and § 4231.3(a)(3)(i) is satisfied if—

(1) In each of the first ten plan years beginning on or after the proposed effective date of the merger or transfer, the plan's expected fair market value of assets plus expected contributions and investment earnings equal or exceed expected expenses and benefit payments for the plan year; or

(2) The plan's expected fair market value of assets immediately after the merger or transfer equals or exceeds ten times the benefit payments for the last plan year ending before the proposed effective date of the merger or transfer.

(b) *Significantly affected plans.* The plan solvency requirement of section 4231(b)(3) of ERISA and § 4231.3(a)(3)(i) is satisfied for a significantly affected plan if all of the following requirements are met:

(1) Expected contributions equal or exceed the estimated amount necessary to satisfy the minimum funding requirement of section 431 of the Code for the ten plan years beginning on or after the proposed effective date of the transaction.

(2) The plan's expected fair market value of assets immediately after the transaction

equal or exceed the total amount of expected benefit payments for the first ten plan years beginning on or after the proposed effective date of the transaction.

(3) Expected contributions for the first plan year beginning on or after the proposed effective date of the transaction equal or exceed expected benefit payments for that plan year.

(4) Expected contributions for the amortization period equal or exceed unfunded accrued benefits plus expected normal costs. The actuary may select as the amortization period either—

(i) The first 15 plan years beginning on or after the proposed effective date of the transaction, or

(ii) The amortization period for the resulting base when the combined charge base and the combined credit base are offset under section 431(b)(5) of the Code.

(c) *Rules for determinations.* In determining whether a transaction satisfies the plan solvency requirements set forth in this section, the following rules apply:

(1) Expected contributions after a merger or transfer must be determined by assuming that contributions for each plan year will equal contributions for the last full plan year ending before the date on which the notice of merger or transfer is filed with PBGC. If expected contributions include withdrawal liability payments, such payments must be shown separately. If the withdrawal liability payments are not the assessed amounts, or are not in accordance with the schedule of payments, or include future assessments, include the basis for such differences, with supporting data, calculations, assumptions, and methods. In addition, contributions must be adjusted to reflect—

(i) The merger or transfer;

(ii) Any change in the rate of employer contributions that has been negotiated (whether or not in effect); and

(iii) Any trend of changing contribution base units over the preceding five plan years or other period of time that can be demonstrated to be more appropriate.

(2) Expected normal costs must be determined under the funding method and assumptions expected to be used by the plan actuary for purposes of determining the minimum funding requirement under section 431 of the Code. If the plan uses an aggregate funding method, normal costs must be determined under the entry age normal method.

(3) Expected benefit payments must be determined by assuming that current benefits remain in effect and that all scheduled increases in benefits occur.

(4) The plan's expected fair market value of assets immediately after the merger or transfer must be based on the most recent data available immediately before the date on which the notice is filed.

(5) Expected investment earnings must be determined using the same interest assumption to be used for determining the minimum funding requirement under section 431 of the Code.

(6) Expected expenses must be determined using expenses in the last plan year ending before the notice is filed, adjusted to reflect any anticipated changes.

(7) Expected plan assets for a plan year must be determined by adjusting the most current data on the plan's fair market value of assets to reflect expected contributions, investment earnings, benefit payments and expenses for each plan year between the date of the most current data and the beginning of the plan year for which expected assets are being determined.

#### **§ 4231.7 De minimis mergers and transfers.**

(a) *Special plan solvency rule.* The determination of whether a de minimis merger or transfer satisfies the plan solvency requirement in § 4231.6(a) may be made without regard to any other de minimis mergers or transfers that have occurred since the most recent actuarial

valuation.

(b) *De minimis merger defined.* A merger is *de minimis* if the present value of accrued benefits (whether or not vested) of one plan is less than 3 percent of the other plan's fair market value of assets.

(c) *De minimis transfer defined.* A transfer of assets or liabilities is *de minimis* if—

(1) The fair market value of assets transferred, if any, is less than 3 percent of the fair market value of assets of all of the transferor plan's assets;

(2) The present value of the accrued benefits transferred (whether or not vested) is less than 3 percent of the fair market value of assets of all of the transferee plan's assets; and

(3) The transferee plan is not a plan that has terminated under section 4041A(a)(2) of ERISA.

(d) *Value of assets and benefits.* For purposes of paragraphs (b) and (c) of this section, the value of plan assets and accrued benefits may be determined as of any date prior to the proposed effective date of the transaction, but not earlier than the date of the most recent actuarial valuation.

(e) *Aggregation required.* In determining whether a merger or transfer is *de minimis*, the assets and accrued benefits transferred in previous *de minimis* mergers and transfers within the same plan year must be aggregated as described in paragraphs (e)(1) and (2) of this section. For the purposes of those paragraphs, the value of plan assets may be determined as of the date during the plan year on which the total value of the plan's assets is the highest.

(1) A merger is not *de minimis* if the total present value of accrued benefits merged into a plan, when aggregated with all prior *de minimis* mergers of and transfers to that plan effective within the same plan year, equals or exceeds 3 percent of the value of the plan's assets.



(2) A transfer is not de minimis if, when aggregated with all previous de minimis mergers and transfers effective within the same plan year—

(i) The value of all assets transferred from a plan equals or exceeds 3 percent of the value of the plan's assets; or

(ii) The present value of all accrued benefits transferred to a plan equals or exceeds 3 percent of the plan's assets.

**§ 4231.8 Filing requirements; timing and method of filing.**

(a) *When to file.* Except as provided in paragraph (g) of this section, a notice of a proposed merger or transfer, and, if applicable, a request for a compliance determination or facilitated merger (which may be filed separately or combined), must be filed not less than the following number of days before the proposed effective date of the transaction—

(1) 270 days in the case of a facilitated merger under § 4231.12;

(2) 120 days in the case of a merger (other than a facilitated merger) for which a compliance determination under § 4231.10 is requested, or a transfer; or

(3) 45 days in the case of a merger for which a compliance determination under § 4231.10 is not requested.

(b) *Method of filing.* PBGC applies the rules in subpart A of part 4000 of this chapter to determine permissible methods of filing with PBGC under this part.

(c) *Computation of time.* PBGC applies the rules in subpart D of part 4000 of this chapter to compute any time period for filing under this part.

(d) *Who must file.* The plan sponsors of all plans involved in a merger or transfer, or the duly authorized representative(s) acting on behalf of the plan sponsors, must jointly file the notice required by subpart A of this part, and, if applicable, a request for a facilitated merger

under § 4231.12.

(e) *Where to file.* See § 4000.4 of this chapter for information on where to file.

(f) *Date of filing.* PBGC applies the rules in subpart C of part 4000 of this chapter to determine the date a submission under this part was filed with PBGC. For purposes of paragraph (a) of this section, the notice, and, if applicable, a request for a compliance determination or facilitated merger, is not considered filed until all of the information required under this part has been submitted.

(g) *Waiver of timing of notice.* PBGC may waive the timing requirements of paragraph (a) of this section and section 4231(b)(1) of ERISA if—

(1) A plan sponsor demonstrates to the satisfaction of PBGC that failure to complete the merger or transfer in less than the applicable notice period set forth in paragraph (a) of this section will cause harm to participants or beneficiaries of the plans involved in the transaction;

(2) PBGC determines that the transaction complies with the requirements of section 4231 of ERISA; or

(3) PBGC completes its review of the transaction.

#### **§ 4231.9 Notice of merger or transfer.**

Each notice of proposed merger or transfer required under section 4231(b)(1) of ERISA and this subpart must contain the following information:

(a) For each plan involved in the merger or transfer—

(1) The name of the plan;

(2) The name, address and telephone number of the plan sponsor and of the plan sponsor's duly authorized representative, if any; and

(3) The plan sponsor's EIN and the plan's PN and, if different, the EIN or PN last filed

with PBGC. If no EIN or PN has been assigned, the notice must so indicate.

(b) Whether the transaction being reported is a merger or transfer, whether it involves any plan that has terminated under section 4041A(a)(2) of ERISA, whether any significantly affected plan is involved in the transaction (and, if so, identifying each such plan), and whether it is a de minimis transaction as defined in § 4231.7 (and, if so, including an enrolled actuary's certification to that effect).

(c) The proposed effective date of the transaction.

(d) A copy of each plan provision stating that no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date.

(e) For each plan that exists after the transaction, one of the following statements, certified by an enrolled actuary:

(1) A statement that the plan satisfies the applicable plan solvency test set forth in § 4231.6, indicating which is the applicable test, and including the supporting data, calculations, assumptions, and methods.

(2) A statement of the basis on which the actuary has determined under § 4231.3(a)(3)(ii) that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA, including the supporting data, calculations, assumptions, and methods.

(f) For each plan that exists before a transaction (unless the transaction is de minimis and does not involve a request for financial assistance, or any plan that has terminated under section 4041A(a)(2) of ERISA), a copy of the most recent actuarial valuation report that satisfies the requirements of § 4231.5.

(g) For each significantly affected plan that exists after the transaction, the following

information used in making the plan solvency determination under § 4231.6(b):

(1) The present value of the accrued benefits and plan's fair market value of assets under the valuation required by § 4231.5, allocable to the plan after the transaction.

(2) The fair market value of assets in the plan after the transaction (determined in accordance with § 4231.6(c)(4)).

(3) The expected benefit payments for the plan in the first plan year beginning on or after the proposed effective date of the transaction (determined in accordance with § 4231.6(c)(3)).

(4) The contribution rates in effect for the plan for the first plan year beginning on or after the proposed effective date of the transaction.

(5) The expected contributions for the plan in the first plan year beginning on or after the proposed effective date of the transaction (determined in accordance with § 4231.6(c)(1)).

**§ 4231.10 Request for compliance determination.**

(a) *General.* The plan sponsor(s) of one or more plans involved in a merger or transfer, or the duly authorized representative(s) acting on behalf of the plan sponsor(s), may file a request for a determination that the transaction complies with the requirements of section 4231 of ERISA. If the plan sponsor(s) requests a compliance determination, the request must be filed with the notice of merger or transfer under § 4231.3(a)(4), and must contain the information described in paragraph (c) of this section, as applicable.

(b) *Single request permitted for all de minimis transactions.* A plan sponsor may submit a single request for a compliance determination covering all de minimis mergers or transfers that occur between one plan valuation and the next. However, the plan sponsor must still notify PBGC of each de minimis merger or transfer separately, in accordance with §§ 4231.8 and 4231.9. The single request for a compliance determination may be filed concurrently with any

one of the notices of a de minimis merger or transfer.

(c) *Contents of request.* A request for a compliance determination concerning a merger or transfer that is not de minimis must contain—

(1) A copy of the merger or transfer agreement; and

(2) For each significantly affected plan, other than a plan that is a significantly affected plan only because the merger or transfer involves a plan that has terminated by mass withdrawal under section 4041A(a)(2) of ERISA, copies of all actuarial valuations performed within the 5 years preceding the date of filing the notice required under § 4231.3(a)(4).

#### **§ 4231.11 Actuarial calculations and assumptions.**

(a) *Most recent valuation.* All calculations required by this part must be based on the most recent actuarial valuation as of the date of filing the notice, updated to show any material changes.

(b) *Assumptions.* All calculations required by this part must be performed by an enrolled actuary based on methods and assumptions each of which is reasonable (taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

(c) *Updated calculations.* PBGC may require updated calculations and representations based on the actual effective date of a merger or transfer if that date is more than one year after the notice is filed, based on revised actuarial assumptions, or based on other good cause.

#### **Subpart B—Additional Rules for Facilitated Mergers**

##### **§ 4231.12 Request for facilitated merger.**

(a) *General.* (1) The plan sponsors of the plans involved in a proposed merger may request that PBGC facilitate the merger. Facilitation may include training, technical assistance,

mediation, communication with stakeholders, and support with related requests to other government agencies. Facilitation may also include financial assistance to the merged plan. PBGC has discretion under section 4231(e) of ERISA to take such actions as it deems appropriate to facilitate the merger of two or more multiemployer plans if it determines, after consultation with the Advocate, that the proposed merger is in the interests of the participants and beneficiaries of at least one of the plans, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the proposed merger. For a facilitated merger, including a financial assistance merger, the requirements of section 4231(b) of ERISA and subpart A of this part must be satisfied in addition to the requirements of section 4231(e) of ERISA and this subpart. The procedures set forth in this subpart represent the exclusive means by which PBGC will approve a request for a facilitated merger under section 4231(e) of ERISA.

(2) *Financial assistance.* Subject to the requirements in section 4231(e) of ERISA and this subpart, in the case of a request for a financial assistance merger, PBGC may in its discretion provide financial assistance (within the meaning of section 4261 of ERISA). Such financial assistance will be with respect to the guaranteed benefits payable under the critical and declining status plan(s) involved in the facilitated merger.

(b) *Information requirements.* (1) A request for a facilitated merger, including a request for a financial assistance merger, must be filed with the notice of merger under § 4231.3(a)(4), and must contain the information described in § 4231.10, and a detailed narrative description with supporting documentation demonstrating that the proposed merger is in the interests of participants and beneficiaries of at least one of the plans, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. If a

financial assistance merger is requested, the narrative description and supporting documentation may consider the effect of financial assistance in making these demonstrations.

(2) If a financial assistance merger is requested, the request must contain the information required in §§ 4231.13 through 4231.16 in addition to the information required in paragraph (b)(1) of this section.

(3) *Additional information.* PBGC may require the plan sponsors to submit additional information to determine whether the requirements of section 4231(e) of ERISA are met or to enable it to facilitate the merger.

(c) *Duty to amend and supplement.* During any time in which a request for a facilitated merger, including a request for a financial assistance merger, is pending final action by PBGC, the plan sponsors must promptly notify PBGC in writing of any material fact or representation contained in or relating to the request, or in any supporting documents, that is no longer accurate or was omitted.

#### **§ 4231.13 Plan information for financial assistance merger.**

A request for a financial assistance merger must include the following information for each plan involved in the merger:

(a) The most recent trust agreement, including all amendments adopted since the last restatement.

(b) The most recent plan document, including all amendments adopted since the last restatement.

(c) The most recent summary plan description (SPD), and all summaries of material modification issued since the most recent SPD.

(d) If applicable, the most recent rehabilitation plan (or funding improvement plan), including all subsequent amendments and updates, and the percentage of total contributions received under each schedule of the rehabilitation plan (or funding improvement plan) for the most recent plan year available.

(e) A copy of the plan's most recent IRS determination letter.

(f) A copy of the plan's most recent Form 5500 (Annual Report Form) and all schedules and attachments (including the audited financial statement).

(g) A current listing of employers who have an obligation to contribute to the plan, and the approximate number of participants for whom each employer is currently making contributions.

(h) A schedule of withdrawal liability payments collected in each of the most recent five plan years.

(i) If applicable, a copy of the plan sponsor's application for suspension of benefits under section 305(e)(9)(G) of ERISA (including all attachments and exhibits).

**§ 4231.14 Description of financial assistance merger.**

A request for a financial assistance merger must include the following information about the proposed financial assistance merger:

(a) A detailed description of the proposed financial assistance merger, including any larger integrated transaction of which the merger is a part (including, but not limited to, an application for suspension of benefits under section 305(e)(9)(G) of ERISA).

(b) A narrative description of the events that led to the plan sponsors' decision to submit a request for a financial assistance merger.



(c) A narrative description of significant risks and assumptions relating to the proposed financial assistance merger and the projections provided in support of the request.

(d) A detailed description of the estimated total amount of financial assistance the plan sponsors request for each year, including the supporting data, calculations, assumptions, and a description of the methodology used to determine the estimated amounts.

**§ 4231.15 Actuarial and financial information for financial assistance merger.**

A request for a financial assistance merger must include the following actuarial and financial information for the plans involved in the merger:

(a) A copy of the actuarial valuation performed for each of the two plan years before the most recent actuarial valuation filed in accordance with § 4231.5.

(b) If applicable, a copy of the plan actuary's most recent annual actuarial certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(c) A detailed statement certified by an enrolled actuary that the merger is necessary for one or more of the plans involved to avoid or postpone insolvency, including the basis for the conclusion, supporting data, calculations, assumptions, and a description of the methodology. This statement must demonstrate for each critical and declining status plan involved in the merger that the date the plan projects to become insolvent (without reflecting the merger) is earlier than the date the merged plan projects to become insolvent (the merged plan may reflect the proposed financial assistance). Include as an exhibit annual cash flow projections for each

critical and declining status plan involved in the merger through the date the plan projects to become insolvent (using an open group valuation and without reflecting the merger). Annual cash flow projections must reflect the following information:

- (1) Fair market value of assets as of the beginning of the year.
- (2) Contributions and withdrawal liability payments.
- (3) Benefit payments organized by participant type (*e.g.*, active, retiree, terminated vested).
- (4) Administrative expenses.
- (5) Fair market value of assets as of the end of the year.
- (d) For each critical and declining status plan involved in the merger, a long-term projection (at least 50 to 90 years) of benefit disbursements by participant type (*e.g.*, active, retiree, terminated vested) (without reflecting the merger) reflecting reduced benefit disbursements at the PBGC-guarantee level beginning with the proposed effective date of the merger (using a closed group valuation and no accruals after the proposed effective date of the merger).
- (e) For each critical and declining status plan involved in the merger, a long-term projection (at least 50 to 90 years) of benefit disbursements by participant type (*e.g.*, active, retiree, terminated vested) (without reflecting the merger) reflecting maximum benefit suspensions that would be permissible under section 305(e)(9) of ERISA beginning with the proposed effective date of the merger (using an open group valuation).
- (f) A detailed statement certified by an enrolled actuary that financial assistance is necessary for the merged plan to become or remain solvent, including the basis for the conclusion, supporting data, calculations, assumptions, and a description of the methodology.

Include as an exhibit annual cash flow projections for the merged plan with the proposed financial assistance (based on the actuarial assumptions and methods that will be used under the merged plan). Annual cash flow projections must reflect the information listed in paragraphs (c)(1) through (5) of this section. In addition, include as an exhibit a statement of whether the merged plan would be in critical status for purposes of paragraph (f)(1) or (2) of this section, including the basis for the conclusion.

(1) If the merged plan would be in critical status immediately following the merger without the proposed financial assistance (as reasonably determined by the enrolled actuary), the enrolled actuary's certified statement must demonstrate that the merged plan will avoid insolvency under section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder (excluding stochastic projections) with the proposed financial assistance.

(2) If the merged plan would not be in critical status immediately following the merger without the proposed financial assistance (as reasonably determined by the enrolled actuary), the enrolled actuary's certified statement must demonstrate that the merged plan is not projected to become insolvent during the 20 plan years beginning after the proposed effective date of the merger with the proposed financial assistance (using the methodologies set forth under section 305(b)(3)(B)(iv) of ERISA and the regulations thereunder). If such a demonstration is possible without the proposed financial assistance, or if the amount of financial assistance requested exceeds the amount needed to satisfy this demonstration, the enrolled actuary's certified statement must demonstrate that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent.

(g) If applicable, a copy of the plan actuary's certification under section 305(e)(9)(C)(i) of ERISA.

(h) The rules in § 4231.6(c) apply to the solvency projections described in § 4231.15(c) and (f), unless section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder apply and specify otherwise.

**§ 4231.16 Participant census data for financial assistance merger.**

A request for a financial assistance merger must include a copy of the census data used for the projections described in § 4231.15(c) and (f), including:

(a) Participant type (retiree, beneficiary, disabled, terminated vested, active, alternate payee).

(b) Gender.

(c) Date of birth.

(d) Credited service for guarantee calculation (*i.e.*, number of years of participation).

(e) Vested accrued monthly benefit.

(f) Monthly benefit guaranteed by PBGC.

(g) Monthly benefit reduced by the maximum benefit suspension permissible under section 305(e)(9) of ERISA.

(h) Benefit commencement date (for participants in pay status and others for which the reported benefit will not be payable at normal retirement age).

(i) For each participant in pay status—

(1) Form of payment, and

(2) Data relevant to the form of payment, including:

(i) For a joint-and-survivor benefit, the beneficiary's benefit amount and the beneficiary's date of birth;

- (ii) For a Social Security level income benefit, the date of any change in the benefit amount, and the benefit amount after such change;
- (iii) For a 5-year certain or 10-year certain benefit (or similar benefit), the relevant defined period; or
- (iv) For a form of payment not otherwise described in this section, the data necessary for the valuation of the form of payment.
- (j) If an actuarial increase for postponed retirement applies, or if the form of annuity is a Social Security level income option, the monthly vested benefit payable at normal retirement age in normal form of annuity.

**§ 4231.17 PBGC action on a request for facilitated merger.**

(a) *General.* PBGC may approve or deny a request for a facilitated merger, including a request for a financial assistance merger, at its discretion if the requirements of section 4231 of ERISA are satisfied. PBGC will notify the plan sponsor(s) in writing of its decision on a request. If PBGC denies the request, PBGC's written decision will state the reason(s) for the denial. If PBGC approves a request for a financial assistance merger, PBGC will provide a financial assistance agreement detailing the total amount and terms of the financial assistance as soon as practicable thereafter.

(b) *Final agency action.* PBGC's decision to approve or deny a request for a facilitated merger, including a request for a financial assistance merger, is a final agency action for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 et seq.).

**§ 4231.18 Jurisdiction over financial assistance merger.**

(a) *General.* PBGC will retain jurisdiction over the merged plan resulting from a financial assistance merger to carry out the purposes, terms, and conditions of the financial

assistance merger, the financial assistance agreement, sections 4231 and 4261 of ERISA, and the regulations thereunder.

(b) *Financial assistance agreement.* PBGC may, upon providing notice to the plan sponsor, make changes to the financial assistance agreement in response to changed circumstances consistent with sections 4231 and 4261 of ERISA and the regulations thereunder.

Issued in Washington DC this 25 day of May, 2016.

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W. Thomas Reeder  
Director  
Pension Benefit Guaranty Corporation

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